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# AN ANALYSIS OF JURISDICTIONAL ISSUES ARISING FROM *EASTERN ENTERPRISES V. APFEL*

Richard H. Seamon\*

## I. INTRODUCTION

This Article examines jurisdictional issues arising from *Eastern Enterprises v. Apfel*.<sup>1</sup> Part II of the Article focuses on the part of the *Eastern Enterprises* opinion in which a plurality of the Court held that the federal district court had jurisdiction over the plaintiff's claim for declaratory and injunctive relief under the Takings Clause.<sup>2</sup> Part II concludes that in two respects the plurality's holding on jurisdiction will cause needless

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\* Assistant Professor of Law, University of South Carolina; J.D., Duke University. This Article is based on one presented at the Spring 1999 Symposium of the Court of Federal Claims, *When Does Retroactivity Cross the Line: Winstar, Eastern Enterprises and Beyond*. I changed the title of this Article from that of the presentation so that the title more accurately describes the contents. I have also changed parts of the content to reflect what I hope are refinements in my thinking. I thank the Honorable Eric Bruggink, Judge of the United States Court of Federal Claims, for inviting me to participate in the symposium.

1. 524 U.S. 498 (1998). *Eastern Enterprises* involved the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act" or "Act"), 26 U.S.C. §§ 9701-9722 (1994 & Supp. III 1997). The Act required the plaintiff, Eastern Enterprises, to pay money into a privately operated fund for the health care costs of its former employees and their dependents. *Eastern Enters.*, 524 U.S. at 512-17. (O'Connor, J., joined by Rehnquist, C.J., Scalia and Thomas, JJ.) (hereafter cited as "plurality opinion"). The company brought a lawsuit in the United States District Court for the District of Massachusetts, seeking declaratory and injunctive relief against the Coal Act. *Id.* at 520 (plurality opinion). The company argued that, as applied to it, the Coal Act violated the doctrine of substantive due process and had "taken" its property within the meaning of the Just Compensation Clause of the Fifth Amendment. *Id.* at 516. Four members of the U.S. Supreme Court held that "the Coal Act's application to Eastern [Enterprises] effects an unconstitutional taking." *Id.* at 537 (plurality opinion). A fifth Justice held that, although the Act did not violate the Just Compensation Clause, it did violate substantive due process. *Id.* at 539-53 (Kennedy, J., concurring in the judgment and dissenting in part).

2. See *Eastern Enters.*, 524 U.S. at 519-22 (plurality opinion). This part of the plurality opinion did not command a majority. See *id.* at 547 (Kennedy, J., concurring in the judgment and dissenting in part) (finding it "unnecessary to comment upon" the plurality's jurisdictional analysis).

confusion and that in a third respect it is wrong. Specifically, the plurality's jurisdictional holding will generate unnecessary confusion about: (1) when federal district courts can hear takings cases and (2) what issues they can decide in those cases. In addition, the plurality's jurisdictional holding is wrong in enjoining a federal statute on the ground that the statute has "taken" property within the meaning of the Fifth Amendment.<sup>3</sup> Part III examines an issue that partakes of jurisdiction and that arises from the Court's opinions on the merits in *Eastern Enterprises*. The issue is whether the Court of Federal Claims can award compensatory relief for government action that has taken private property if a federal district court has previously held that the same government action is unconstitutional on other grounds. Part III concludes that the Court of Federal Claims can grant compensatory relief in that situation, as long as the government action is not "ultra vires".

## II. THREE PROBLEMS WITH THE PLURALITY'S JURISDICTIONAL ANALYSIS

The *Eastern Enterprises* plurality upheld the district court's jurisdiction based on a presumption.<sup>4</sup> The plurality presumed that the plaintiff, *Eastern Enterprises*, could not sue in the United States Court of Federal Claims under the Tucker Act<sup>5</sup> because the Coal Act had withdrawn *Eastern Enterprises'* Tucker Act remedy.<sup>6</sup> That presumption effectively forced *Eastern Enterprises* to seek relief in the federal district courts. The plurality's presumption reflects a reasonable understanding of congressional intent, and it justified district court jurisdiction over the takings claim asserted in *Eastern Enterprises*. There are nonetheless three problems with the plurality's jurisdictional analysis. *First*, the plurality should not have endorsed district court jurisdiction in two earlier takings cases: *Babbitt v.*

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3. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

4. *Eastern Enters.*, 524 U.S. at 520-21.

5. 28 U.S.C. § 1491(a)(1) (1994).

6. *Eastern Enters.*, 524 U.S. at 520 (holding that the relief requested was not within the Court of Federal Claims' jurisdiction); 28 U.S.C. §§ 1346(a), 1491 (1994 & Supp. III 1997).

*Youpee*<sup>7</sup> and *Hodel v. Irving*.<sup>8</sup> *Second*, the plurality should have clarified, or at least acknowledged the lack of clarity, in its precedent concerning what a district court should do when it determines that a Tucker Act remedy is available for the taking claim that has been asserted in the district court. *Third*, the plurality should not have upheld the award of a permanent and unconditional injunction against the Coal Act on the ground that the Act caused a taking of Eastern Enterprises' property.

#### A. *The Presumption of Tucker Act Unavailability*

The plurality in *Eastern Enterprises* was right to adopt a presumption; furthermore, that presumption supported district court jurisdiction in that case. The plurality observed that the federal statute challenged in that case, the Coal Act, required regulated entities to transfer funds to another entity.<sup>9</sup> (The receipt of the funds was a privately operated but statutorily recognized entity called "the Combined Fund" that used the funds to pay the health care costs of former coal miners and their dependents.)<sup>10</sup> The plurality reasoned that, when Congress enacts such a transfer-of-funds statute, it could not intend the entity who pays out the funds to be able to turn around and sue the United States under the Tucker Act to recover those funds.<sup>11</sup> The plurality accordingly determined that when an entity asserts a taking challenge to a transfer-of-funds statute in federal district court, the court should not presume that a Tucker Act remedy would be available in the Court of Federal Claims.<sup>12</sup> Instead, "the presumption of Tucker Act availability must be

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7. 519 U.S. 234 (1997).

8. 481 U.S. 704 (1987).

9. *Eastern Enters.*, 524 U.S. at 521 (plurality opinion) ("The payments mandated by the Coal Act, although calculated by a Government agency, are paid to the privately operated Combined Fund.").

10. *Id.* at 514.

11. *Id.* at 521 (plurality opinion) ("Congress could not have contemplated that the Treasury would compensate coal operators for their liability under the Act, for [e]very dollar paid pursuant to a statute would be presumed to generate a dollar of Tucker Act compensation.") (quoting *In re Chateaugay Corp.*, 53 F.3d 478, 493 (2d Cir. 1995), *cert. denied*, *LTV Steel Co. v. Shalala*, 516 U.S. 913 (1995)).

12. See *Eastern Enters.*, 524 U.S. at 521 (plurality opinion).

reversed where the challenged statute, rather than burdening real or physical property, requires a direct transfer-of-funds mandated by the Government."<sup>13</sup>

To begin with, it is important to note that the plurality's presumption about transfer-of-funds statutes is a tool of statutory interpretation. It reflects a judgment about what Congress intends when enacting such a statute.<sup>14</sup> It posits that Congress intends a transfer-of-funds statute to trim back the Tucker Act. In other words, the presumption is that the transfer-of-funds statute partially and impliedly repeals the Tucker Act. As such, this new presumption carves out an exception to the presumption against implied repeals.<sup>15</sup> Given the longstanding nature of the presumption against implied repeals,<sup>16</sup> one can fairly ask whether the new presumption is justified. One might say that the old presumption against implied repeals creates at least a mild presumption against the new presumption of Tucker Act unavailability!

The new presumption reflects a reasonable understanding of Congress' intent. It recognizes that, when Congress compels a person to pay money, Congress probably does not want that person to be able to get the money back using the Tucker Act. As the plurality observed, the person's Tucker Act claim "would entail an utterly pointless set of activities."<sup>17</sup> This becomes apparent when considering how the Tucker Act could have been used, had it been available, in the *Eastern Enterprises* situation. The Tucker Act generally authorizes only awards of money.<sup>18</sup> If *Eastern Enterprises* wanted to sue under the Act, it would have

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13. *Id.* (quoting *In re Chateaugay Corp.*, 53 F.3d at 493).

14. *See id.* (presuming what "Congress could not have contemplated").

15. *See, e.g.*, *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976) (citing the "cardinal principle of statutory construction that repeals by implication are not favored").

16. *See, e.g.*, *Ex parte Yerger*, 75 U.S. 85, 105 (1869) (relying on the canon disfavoring implied repeals).

17. *See Eastern Enters.*, 524 U.S. at 521 (plurality opinion) (quoting *Student Loan Marketing Ass'n v. Riley*, 104 F.3d 397, 401 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 913 (1997)).

18. *See, e.g.*, *United States v. Mitchell*, 463 U.S. 206, 216 (1983) (finding that, to be cognizable under the Tucker Act, "[t]he claim must be one for money damages against the United States"), *cited in Eastern Enters.*, 524 U.S. at 520 (plurality opinion).

had to wait until it had paid money into the Combined Fund.<sup>19</sup> Then Eastern Enterprises could go into the Court of Federal Claims and get an award from the Treasury of the amount it had paid into the combined Fund.<sup>20</sup> It is hard to imagine why Congress would want to require this wasteful round of litigation. It is more sensible to presume that Congress did not want a plaintiff like Eastern Enterprises to have a Tucker Act remedy to recover the funds that a later statute required it to pay out.

*B. Problem One: The Plurality's Failure to Explain Why the Presumption of Tucker Act Unavailability Created District Court Jurisdiction Over the Takings Claim*

Although the plurality explained why it is reasonable to presume that Congress wants to take away the Tucker Act remedy when it enacts a transfer-of-funds statute, the plurality did not clearly explain why the absence of a Tucker Act remedy made it proper for the district court to take jurisdiction over Eastern Enterprises' takings claim. In the absence of a clear explanation, there will continue to be confusion about when district courts can assert jurisdiction over takings claims.

Here is why the absence of a Tucker Act remedy made it proper for the district court to assert jurisdiction over the takings claim: The Fifth Amendment requires the government, at the time of a taking, to provide "adequate assurance" that it will pay just compensation.<sup>21</sup> Such adequate assurance is lacking when Congress withdraws the Tucker Act remedy, and it is lacking even when there is a reasonable doubt about whether such a withdrawal has occurred. The Court in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*<sup>22</sup> held that, when there is doubt about whether there has been such withdrawal, the district courts have statutory authority to provide adequate

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19. See *Eastern Enters.*, 524 U.S. at 521.

20. It is possible that, ancillary to an award of compensation for past payments, the Court of Federal Claims could order the federal government, in the future, periodically to cut a check to Eastern Enterprises for future payments to the Combined Fund. See 28 U.S.C. § 1491(a)(2).

21. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124 (1974); *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U.S. 641, 659 (1890).

22. 438 U.S. 59 (1978).

assurance of just compensation.<sup>23</sup> Specifically, the district courts have power under the federal question statute<sup>24</sup> and the Declaratory Judgment Act<sup>25</sup> to determine and declare whether Congress has withdrawn the Tucker Act remedy with respect to a particular takings claim.<sup>26</sup> If a district court decides and declares that Congress has not withdrawn the Tucker Act remedy, however, its job is complete. The declared availability of the Tucker Act remedy provides adequate assurance of just compensation. The district court should then dismiss the takings claim as premature.<sup>27</sup>

There are two important points in this explanation. First, when a district court is presented with a takings challenge to a federal statute, the district court should initially determine whether a Tucker Act remedy is available. Second, when the district court decides that a Tucker Act remedy is indeed available, the district court should dismiss the case because the determination of Tucker Act availability triggers the principle, often stated by the Supreme Court, that the existence of a Tucker Act remedy renders a takings claim in district court premature.<sup>28</sup> I will refer to this principle as the "prematurity principle."

The *Eastern Enterprises* plurality was not clear on either of these points. First of all, the plurality did not emphasize the need for district courts, as a threshold matter, to determine whether a Tucker Act remedy is available. To the contrary, the plurality cited with apparent approval two cases in which district courts did not make that threshold determination: *Babbitt v. Youpee*<sup>29</sup> and *Hodel v. Irving*.<sup>30</sup> These cases involve takings challenges to the Indian Land Consolidation Act ("ILCA").<sup>31</sup> The ILCA was not a transfer-of-funds statute. Accordingly, the

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23. See *Duke Power Co.*, 438 U.S. at 71 n.15.

24. 28 U.S.C. § 1331 (1994).

25. *Id.* § 2201 (1994).

26. See *Duke Power Co.*, 438 U.S. at 71 n.15.

27. See *id.* at 94 n.39.

28. See, e.g., *Preseault v. I.C.C.*, 494 U.S. 1, 11 (1990) (quoting *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985)).

29. 519 U.S. 234 (1997).

30. 481 U.S. 704 (1987).

31. See *Youpee*, 519 U.S. at 237-43 (describing the statute challenged in that case and in *Irving*).

presumption of Tucker Act unavailability that the *Eastern Enterprises* plurality adopted did not justify the district courts' assertion of jurisdiction in those cases.<sup>32</sup> There may nonetheless have been fair room for doubt about whether Congress had withdrawn the Tucker Act when it enacted the ILCA. If so, then the district courts should have addressed that issue before reaching the takings issue. The *Eastern Enterprises* plurality implied that the district courts have no such obligation by citing *Youpee* and *Irving* with approval.<sup>33</sup> That implication, in turn, arguably implies that, contrary to the prematurity principle, district courts can decide a takings claim even if a Tucker Act remedy is available on the claim. The plurality compounded the problem by describing the prematurity principle as something that its precedent "c[ould] be read" to establish, as if the matter were in doubt.<sup>34</sup>

To sum up the first problem with the plurality's analysis: The plurality should have clarified that district courts confronting a takings claim should first explicitly determine whether a Tucker Act remedy is available. The plurality's failure to make that obligation clear will perpetuate confusion about when district courts can hear takings claims. It bears emphasis, though, that regardless of what the plurality said or failed to say, it did the right thing itself by addressing Tucker Act availability as a threshold matter. Thus, the lower courts, with respect to the issue of when they can hear takings claims, should pay attention to what the plurality did, rather than what it said.

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32. The district courts were arguably justified in asserting jurisdiction based on the federal government's concession that a Tucker Act remedy was not available to the plaintiffs. See Brief for the Petitioners at 13 n.5, *Babbitt v. Youpee*, 519 U.S. 234 (1997) (No. 95-1595); Brief for the Appellant at 25 n.16, *Hodel v. Irving*, 481 U.S. 704 (1987) (No. 85-637); see also Max Kidalov & Richard H. Seamon, *The Missing Pieces of the Debate Over Federal Property-Rights Legislation*, HASTINGS CONST. L.Q. (forthcoming Spring 2000) (discussing *Youpee* and *Irving*).

33. See *Eastern Enters. v. Apfel*, 524 U.S. 498, 521-22 (1998).

34. *Eastern Enters.*, 524 U.S. at 521.



*C. Problem Two: The Plurality's Failure to Acknowledge Inconsistent Precedent on Whether District Courts Can Decide Takings Claims to which a Tucker Act Remedy is Available*

The plurality in *Eastern Enterprises* failed to address clearly this question: What should a district court do when it determines that a Tucker Act remedy is available for a takings challenge to a federal statute? Specifically, should it decide whether the challenged statute actually causes a taking? The Court's precedent on this question points in different directions. In *Duke Power* and *Preseault*, the Court declined to decide whether a federal statute caused a taking once the Court had decided that a Tucker Act remedy was available.<sup>35</sup> In *Ruckelshaus v. Monsanto*,<sup>36</sup> on the other hand, the Court reached the takings issue even though it found a Tucker Act remedy available. All three of these cases were brought in district courts. *Duke Power* and *Preseault* suggest that, if a Tucker Act remedy is available, a district court should not address the takings issue, but *Monsanto* suggests the contrary.<sup>37</sup>

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35. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 94 n.39 (1978); *Preseault v. I.C.C.*, 494 U.S. 1, 17 (1990).

36. 467 U.S. 986, 1004-14 & 1017-19 (1984).

37. See *Bay View, Inc. v. Ahnta, Inc.*, 105 F.3d 1281, 1285 (9th Cir. 1997) (discussing "a common and oft-overlooked error" by federal courts in determining when they have jurisdiction to address takings claims and tracing that error to Court's precedent); *In re Chateaugay Corp.*, 53 F.3d 478, 492 (2d Cir. 1995) ("On their face, the Supreme Court's decisions on federal Takings Clause jurisdiction have not been consonant."); see also *Eastern Enters.*, 524 U.S. at 547 (Kennedy, J., concurring in the judgment and dissenting in part) (declining to join plurality's discussion of "a jurisdictional question . . . which has divided the Courts of Appeals"); *id.* at 520-21 (discussing disagreement among federal courts of appeals on whether plaintiffs with takings claims against federal government can seek relief in federal district court without first seeking compensation). Compare *Chevron Chem. Co. v. Costle*, 499 F. Supp. 732, 743 (D. Del. 1980) (holding that the Court's precedent authorized the district court to determine whether a Tucker Act compensation remedy was available; however, if the court determined that such remedy was available, "a declaratory judgment or other injunctive relief on the taking issue was unwarranted"), *aff'd*, 641 F.2d 104 (3d Cir. 1981), *cert. denied*, 452 U.S. 961 (1981), with *Amchem Prods., Inc. v. Costle*, 481 F. Supp. 195, 199 (S.D.N.Y. 1979) (suggesting that, without regard to availability of compensation, the Court's precedent allowed the district court to issue a declaratory judgment determining whether a taking was caused by the same statute that was at issue in *Chevron Chem. Co. v. Costle*).

The *Eastern Enterprises* plurality should have recognized and identified the inconsistency in its precedent with regard to the district court's power to address taking claims for which Tucker Act remedies are available. Instead, the plurality cited *Preseault* and *Monsanto* together as both supporting the prematurity principle.<sup>38</sup> If a strong view of the prematurity principle is chosen, then *Duke Power* and *Preseault* illustrate the proper approach and *Monsanto* the improper one.<sup>39</sup> One practical problem with the *Monsanto* approach is that it encourages the development of takings law in two separate branches of the federal court system: the district courts, with review in the regional courts of appeals, and the Court of Federal Claims, with review in the Federal Circuit.<sup>40</sup> In any event, the *Eastern Enterprises* plurality's treatment suggests that *Preseault* and *Monsanto* were consistent in their application of the prematurity principle, but they were not.<sup>41</sup> Acknowledgment of this inconsistency would have sensitized the lower courts to the issue and would have been a step towards resolution.

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38. *Eastern Enters.*, 524 U.S. at 521 (plurality opinion) (citing *Preseault* and *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), for the proposition that "this Court's precedent can be read to support the . . . conclusion that regardless of the nature of relief sought, the availability of a Tucker Act remedy renders premature any takings claim in federal district court").

39. As applied to takings claims against the federal government, the prematurity principle emerges from the Court's interpretation of the Declaratory Judgment Act, 28 U.S.C. § 2201 (1994), discussed in *Duke Power*, 438 U.S. at 71 n.15. The *Duke Power* Court interpreted the Act to allow district courts to address takings claims against the federal government when there was an "actual controversy" (28 U.S.C. § 2201(a)) about the availability of adequate compensation for the alleged taking. *Duke Power*, 438 U.S. at 71 n.25. The Court also held, however, that, once a district court determined that adequate compensation was available, it should dismiss the takings claim. *See id.* at 94 n.39. Despite that holding, Congress certainly could amend the Declaratory Judgment Act to allow district courts to decide whether action by the federal government had caused a taking, even if compensation for the taking were available in the Court of Federal Claims under the Tucker Act. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937) (in enacting the Declaratory Judgment Act, Congress was "acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish"); cf. *Rose Acre Farms, Inc. v. Madigan*, 956 F.2d 670, 673 (7th Cir.), cert. denied, 506 U.S. 820 (1992) ("Congress could of course create an entitlement to be free of [federal] takings in lieu of the constitutional requirement of compensation for takings.").

40. Robert Meltz, *The Impact of Eastern Enterprises and Possible Legislation on the Jurisdiction and Remedies of the U.S. Court of Federal Claims*, 51 ALA. L. REV. 1161 (2000).

41. *See* discussion *supra* Problem Two.

*D. Problem Three: The Plurality's Approval of a Permanent Injunction Based on the Takings Clause*

The third problem differs from the first two, in that it involves the result reached by the plurality. The plurality erred in approving the injunction that prevented the application of the Coal Act to Eastern Enterprises.<sup>42</sup> Under current law, federal district courts cannot permanently and unconditionally enjoin conduct by Congress or the Executive Branch on the ground that the conduct would take the plaintiff's property for public use.<sup>43</sup> Instead, the courts must leave the relevant political branch with the option of engaging in the conduct that causes a taking if it pays just compensation to the victim of the taking.<sup>44</sup> The plurality's failure to acknowledge that option might lead the lower courts to foreclose it in future cases where one of the political branches wishes to retain it.

*1. Current Law on Injunctive Relief Against Takings.*—There are three potential sources of authority for a federal district court to enjoin the application of a federal statute alleged to cause a taking: the Takings Clause itself,<sup>45</sup> the Administrative Procedure Act ("APA")<sup>46</sup>; and the federal courts' inherent powers.<sup>47</sup> None of those sources authorized the injunction approved by the plurality of the Court in *Eastern Enterprises*.

The Takings Clause did not authorize the district court in *Eastern Enterprises* to enjoin the government permanently and unconditionally from applying the Coal Act to Eastern Enterprises.<sup>48</sup> After all, the Takings Clause does not prohibit the government from taking private property for public use. It merely imposes conditions.<sup>49</sup> The main condition is that the govern-

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42. See *Eastern Enters.*, 524 U.S. at 522 (plurality opinion) ("[W]e conclude that the declaratory judgment and injunction sought by petitioner constitute an appropriate remedy under the circumstances, and that it is within the district courts' power to award such equitable relief").

43. See discussion *infra* Part IID.1.

44. *Id.*

45. U.S. CONST. amend. V.

46. 5 U.S.C. §§ 551-559, 701-706 (1994 & Supp. IV 1998).

47. See *Marbury v. Madison*, 5 U.S. 137 (1803).

48. See U.S. CONST. amend. V.

49. See, e.g., *First English Evangelical Church v. County of Los Angeles*, 482

ment pay just compensation for property that it has taken.<sup>50</sup> An ancillary condition is that, at the time of the taking, the government provide adequate assurance that it will pay just compensation.<sup>51</sup> The existence of the Tucker Act ordinarily provides such assurance with respect to takings by the federal government.<sup>52</sup> According to the *Eastern Enterprises* plurality, however, Congress withdrew that assurance from plaintiffs asserting takings claims under the Coal Act.<sup>53</sup> The Takings Clause would therefore have authorized a federal district court to enjoin the federal government from taking private property under the Coal Act *unless and until* it gave the victims of the takings adequate assurance of just compensation.<sup>54</sup> The Clause did not, however, authorize the unconditional injunction against enforcement of the Coal Act.<sup>55</sup>

The APA provides no authority for a district court to enjoin

U.S. 304, 314 (1987) (holding that the Just Compensation Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power").

50. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985) ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.").

51. *Dames & Moore v. Regan*, 453 U.S. 654, 689 (1981) (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974) and *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U.S. 641, 659 (1890)); see *Williamson*, 473 U.S. at 194 (quoting same passage from *Rail Reorganization Act Cases* and *Cherokee Nation*).

52. See 28 U.S.C. § 1491 (1994).

53. *Eastern Enters.*, 524 U.S. at 520-22 (plurality opinion).

54. The Takings Clause would not have authorized the district court to order the federal government to reimburse *Eastern Enterprises* for past payments because such an order would have been barred by sovereign immunity. Cf. *United States v. Nordic Village*, 503 U.S. 30, 38-39 (1992) (holding that monetary payment against the government could not be justified on *in rem* theory).

55. *First English Evangelical Church v. County of Los Angeles*, 482 U.S. 304, 317 (1987) ("[T]he government may elect to abandon its intrusion or discontinue regulations [found to cause a taking] . . . the landowner has no right under the Just Compensation Clause to insist that a 'temporary' taking be deemed a permanent taking."); see, e.g., *Monsanto v. Ruckelshaus* 467 U.S. 986, 1016 (1984) ("Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking.") (footnote omitted); *Rose Acre Farms Inc., v. Madigan*, 956 F.2d 670, 673 (7th Cir.), cert. denied, 506 U.S. 820 (1992) ("If either a statute or the Constitution requires compensation, one would suppose, the right way to proceed is to order payment" rather than enjoin government action triggering compensation.).

the application of a federal statute alleged to cause a taking.<sup>56</sup> The APA creates a cause of action against federal agencies for declaratory and injunctive relief,<sup>57</sup> and it defines "agency" in a way that encompasses most executive officials charged with administering a federal statute.<sup>58</sup> Thus, the APA could conceivably authorize a property owner to sue a federal official, such as the Commissioner of the Social Security Administration, charged with administering a statute, such as the Coal Act, that allegedly causes a taking.<sup>59</sup> But the APA does not expand the range of remedies available on that sort of taking claim. The APA authorizes a district court to "set aside agency action . . . found to be . . . contrary to constitutional right . . ."<sup>60</sup> This ties a court's power to a violation of a constitutional right. As explained, the Takings Clause does not create a right to be free from takings. Thus, the APA does not create a cause of action for specific relief against government action on the ground that the action causes a taking.<sup>61</sup>

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56. See 5 U.S.C. § 551 (1994 & Supp. III 1997).

57. *Id.* §§ 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. . . . [An action] seeking relief other than money damages" may not be dismissed on ground of sovereign immunity) & 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."); see also *Bennett v. Spear*, 520 U.S. 154, 175 (1997) (analyzing claims under "causes of action . . . provided by the APA").

58. See 5 U.S.C. § 701(b)(1) (1994). *But cf.* *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992) (holding that the President is not an "agency" for purposes of the APA).

59. The Commissioner of Social Security was responsible for calculating the payments due from Eastern Enterprises under the Coal Act. *Eastern Enters.*, 524 U.S. at 514.

60. 5 U.S.C. § 706(2)(B).

61. When a Tucker Act remedy is available for an alleged taking, the Tucker Act may impliedly forbid declaratory or injunctive relief under the APA. 5 U.S.C. § 702(2) (waiver of sovereign immunity effected by that provision does not "confer[] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought"); cf. *Tucson Airport Auth. v. General Dynamics Corp.*, 136 F.3d 641, 647-48 (9th Cir. 1998) (finding that the Tucker Act impliedly forbids APA action asserting takings claims predicated on government contracts). *But cf.* *Arellano v. Weinberger*, 745 F.2d 1500, 1527-28 (D.C. Cir. 1984) (en banc) (holding that, under some circumstances, a district court could award equitable relief on takings claims even if a Tucker Act remedy were available), *vacated on other grounds*, 471 U.S. 1113 (1985). In contrast, where Congress has enacted a statute withdrawing the Tucker Act remedy, a plaintiff with a takings claim based

Solely for the sake of completeness (though the author claims no expertise on the subject), the following analysis of the inherent powers of the federal courts is offered. The analysis is based mostly on *Marbury v. Madison*.<sup>62</sup> *Marbury* allows a federal court to police Congress to ensure that it stays within constitutional bounds and to police the Executive to ensure that it stays within both constitutional and legislative bounds.<sup>63</sup> *Marbury* also suggests that federal courts may be able to protect vested rights that arise from sources other than the Constitution or federal legislation, including state law.<sup>64</sup> Otherwise, *Marbury* says that there exists a discretion in the Executive Branch, and presumably in the Legislative Branch, with which federal courts cannot interfere.<sup>65</sup> It is hard to glean from *Marbury* or its progeny a basis for federal courts to do more, under the Takings Clause, than ensure that a taking of private property is authorized and justly compensated.<sup>66</sup>

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on that statute might have a cause of action under the APA. The plaintiff would not be entitled to any greater relief, however, than that to which he or she would be entitled directly under the Just Compensation Clause.

62. 5 U.S. 137 (1803).

63. See Richard H. Seamon, *Separation of Power and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 VILL. L. REV. 155, 202-06 (1998).

64. *Marbury*, 5 U.S. at 162-63 (stating the principle that law should provide a remedy for a violation of a vested right).

65. See *id.* at 166 (recognizing that certain actions by a President's agents entail political discretion that can never be examined by the courts); *id.* at 170-71 ("any application to a court to control" exercise of executive discretion by head of a department "would be rejected without hesitation").

66. In *Arellano v. Weinberger*, the *en banc* D.C. Circuit held that a federal court could grant equitable relief based on a taking claim when "the gap between [the plaintiff's injury] and the monetary compensation available through a Tucker Act remedy is so great that an unconscionable injustice would be worked. . . ." 745 F.2d 1500, 1528 (1984). The D.C. Circuit seems to adhere to that holding, even though the judgment in *Arellano* was vacated by the U.S. Supreme Court on other grounds. See *Weinberger v. Ramirez de Arellano*, 471 U.S. 1113 (1985) (granting petition for certiorari, vacating the court of appeals' judgment, and remanding to the court of appeals for reconsideration in light of later legislation); see also *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 613 (D.C. Cir. 1992) (discussing the *Arellano* holding with apparent approval but determining that the holding was inapposite in case before it). In any event, the holding in *Arellano* is consistent with my position, if that holding is understood to permit injunctive relief against government action that not only constitutes a taking of private property for public use but also violates some other constitutional doctrine, such as that of substantive due process.

2. *The Effect of Eastern Enterprises on Current Law.*—Assuming that the Coal Act took Eastern Enterprises' property, the district court should have enjoined the government from applying the Act to Eastern Enterprises only if the government failed to compensate Eastern Enterprises adequately. The district court's failure to condition the injunction in this way did not matter in the *Eastern Enterprises* case. The plurality's approval of the unconditional injunction may nonetheless lead lower courts astray in future cases where it does matter.

The award of an unconditional injunction did not matter in *Eastern Enterprises* because the federal government probably would not have exercised the discretion that it would have retained under a conditional injunction. The Coal Act took Eastern Enterprises' property, the plurality held, by requiring Eastern Enterprises to make payments into the Combined Fund. It is inconceivable that the federal government would have wanted to require Eastern Enterprises to continue making those payments if the government had to reimburse Eastern Enterprises for every dollar that it paid into the Combined Fund. It is inconceivable for the same reason that it was fair to presume that Congress withdrew the Tucker Act remedy when it enacted the Coal Act.

The plurality could have explained that it upheld the unconditional injunction against the Coal Act only because Congress would not want to continue to apply the Act if continued application were conditioned on government payment of compensation. Instead, the plurality merely remarked that the injunction was "an appropriate remedy under the circumstances," without specifying what those circumstances were.<sup>67</sup> The circumstances should be understood to be restricted to cases in which the federal statute that has caused a taking has also withdrawn the Tucker Act remedy. Unfortunately, the plurality's opinion does not compel such a restricted reading. To the contrary, the plurality encourages a broader reading when it cites with apparent approval cases in which district courts "granted equitable relief for Takings Clause violations without discussing the applicability of the Tucker Act."<sup>68</sup> Those citations, coupled with the affir-

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67. *Eastern Enters.*, 524 U.S. at 522 (plurality opinion).

68. *Id.* at 521 (citing *Babbitt v. Youpee*, 519 U.S. 234, 243-45 (1997) and *Hodel*

mance of the district court injunction entered in that case, may plausibly be read to authorize district courts unconditionally to enjoin federal conduct that causes a taking regardless of whether a Tucker Act remedy is available. When a Tucker Act remedy is available, however, the government may want to pursue its conduct even if it has to compensate people for takings caused by that conduct. The federal courts have no power under current law to foreclose that option, yet the *Eastern Enterprises* plurality could be read to suggest that they do.<sup>69</sup>

In *United States v. Winstar*,<sup>70</sup> the Supreme Court illustrates the point. *Winstar* examined a change in federal law that prevented the federal government from honoring contracts with certain financial institutions.<sup>71</sup> Some of the institutions claimed that the government's breach of the contracts took their property.<sup>72</sup> Those institutions may have eschewed compensation in favor of injunctive relief that forced the government to honor its contracts by refraining from applying the new law to them. By the same token, the government may have preferred to pay compensation in order to subject the institutions to the new law. Unless the government's preference violates the Constitution or some federal statute or regulation, federal courts lack power to forbid it.<sup>73</sup> In that situation, the government's choice represents political discretion that, under *Marbury*, is not subject to federal judicial control.<sup>74</sup>

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v. Irving, 481 U.S. 704, 716-18 (1987)). The plaintiffs in both *Youpee* and *Irving* sought injunctive relief against a federal statute in federal district court on the ground that it took private property for public use. See *Youpee*, 519 U.S. at 242; *Irving*, 758 F.2d at 1262. The U.S. Supreme Court in each case affirmed the lower courts' holdings that the statute caused a taking. See *Youpee*, 519 U.S. at 242, 245 (affirming the judgment of the court of appeals, which had affirmed the district court decision awarding injunctive and declaratory relief on the plaintiffs' taking claim); *Hodel*, 481 U.S. at 710, 718 (affirming the court of appeals' judgment reversing the district court decision, which rejected the plaintiffs' suit for injunctive relief based on a takings claim).

69. See *Eastern Enters.*, 524 U.S. at 498 (plurality opinion).

70. *United States v. Winstar Corp.*, 518 U.S. 839 (1996).

71. *Winstar*, 518 U.S. at 871.

72. See *Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 601 (D.C. Cir. 1992) (noting that financial institutions in *Winstar's* situation had often asserted takings claims).

73. See *Marbury v. Madison*, 5 U.S. 137 (1803).

74. *Marbury*, 5 U.S. 137 at 171 ("[A]ny application to a court to control [exercises of executive discretion by head of a Department] would be rejected without



Indeed, if the *Eastern Enterprises* plurality opinion is read to support a contrary conclusion, the opinion would be inconsistent with *Winstar* and the separation-of-powers principles underlying it.<sup>75</sup> A plurality of the Court in *Winstar* in effect adopted a presumption about what the government promises to do if it enacts a new law that prevents it from honoring a contract. Under that presumption, the government promises to pay damages; it does *not* promise to refrain from applying the new law to its contracting party.<sup>76</sup> Two other Justices in *Winstar* were similarly reluctant to presume that "the sovereign . . . shed[s] its sovereign powers just because it contracts."<sup>77</sup> That reluctance accords with the long-standing rule barring specific performance against the government.<sup>78</sup> That rule, in turn, serves separation-of-powers principles.<sup>79</sup> By the same token, the *Eastern Enterprises* plurality opinion would conflict with those principles if it were read to authorize permanent and unconditional injunctive relief against government conduct on the ground that the conduct caused a taking.<sup>80</sup>

### III. JURISDICTIONAL IMPLICATIONS OF THE OPINIONS ON THE MERITS

The plurality's jurisdictional analysis raises questions about

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hesitation.").

75. *Winstar*, 518 U.S. at 861.

76. See *id.* at 868-70 (Souter, J., joined by Stevens, O'Connor and Breyer, JJ.).

77. *Id.* at 929 (Rehnquist, C.J., dissenting, joined in relevant part by Ginsburg, J.).

78. See Seamon, *supra* note 63, at 155 n.3 (citing commentary recognizing long-standing rule barring specific performance against the government); *id.* at 159-74 (discussing case law developing the rule).

79. See *id.* at 197-217.

80. The "no injunction" rule discerned in the Takings Clause and precedent construing it prevents only injunctions that are based solely on the ground that a federal statute causes a taking (or breaches a contract). The rule does not prevent injunctions on some other ground. Thus, if the Coal Act violated substantive due process, as Justice Kennedy believed, that violation would have justified an injunction preventing enforcement of the Act against *Eastern Enterprises*. See *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 701 n.25 (1949) (disapproving of the reasoning in *Goltra v. Weeks*, 271 U.S. 536 (1926), and suggesting that the grant of specific relief in *Goltra* may have been justified by proof that government conduct was "an arbitrary taking of property without due process of law"); see also *Goltra*, 271 U.S. at 550 (discussing due process claim).

the power of federal district courts to address and remedy takings claims in light of the possible availability of a remedy in the Court of Federal Claims under the Tucker Act. The decisions on the merits in *Eastern Enterprises* likewise raise a question about the respective powers of the district courts and the Court of Federal Claims in cases involving takings claims.

The Justices' views on the merits in *Eastern Enterprises* may encourage plaintiffs to join takings claims against the federal government with claims based on substantive due process or other constitutional grounds.<sup>81</sup> Four Justices held that the Coal Act effected an unconstitutional taking, and a fifth held that the Act violated substantive due process.<sup>82</sup> Although four other Justices found no violation of substantive due process, they recognized that the doctrine of substantive due process limits "an unfair allocation of public burdens."<sup>83</sup> That recognition, coupled with *Eastern Enterprises*' victory, could lead to more cases that combine takings challenges with substantive due process challenges. These mixed challenges will not necessarily concern only transfer-of-funds statutes. They may also involve regulatory takings cases and statutes like the ILCA.

These mixed challenges will generally have to be litigated in two separate fora and involve two different types of relief. A federal district court will have subject-matter jurisdiction over the substantive due process claim. Because of sovereign immunity, the district court can grant only declaratory and injunctive relief on that claim. The district court will not have jurisdiction to decide the takings claim or to award compensation on that claim (if it exceeds \$10,000).<sup>84</sup> The plaintiff's takings claim, in contrast, will (if it exceeds \$10,000) have to be litigated in the Court of Federal Claims (assuming that Congress has not withdrawn the Tucker Act remedy or displaced Tucker Act jurisdiction in a particular case). The Court of Federal Claims generally will have authority only to grant compensatory relief.<sup>85</sup>

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81. See *Eastern Enters.*, 524 U.S. at 498.

82. See *supra* note 1.

83. *Eastern Enters.*, 524 U.S. at 558 (Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, JJ.).

84. See 28 U.S.C. § 1346(a)(2) (1994) ("Little Tucker Act").

85. See *United States v. Mitchell*, 463 U.S. 206, 216 (1983) (finding that the Tucker Act generally authorizes only monetary relief). *But cf.* 28 U.S.C. § 1491(a)(2)

An issue that could arise in this dual-forum litigation is whether the unconstitutionality of the government action precludes a claim that the same government action has caused a taking. Until recently, the Court of Federal Claims had held that the government action underlying a takings claim must be lawful.<sup>86</sup> Those holdings suggested that a plaintiff could not get both compensatory relief for federal conduct that had caused a taking and prospective relief against a continuation of the conduct on other constitutional grounds. This precedent has been only partially superseded by the Federal Circuit's decision in *Del-Rio Drilling Programs, Inc. v. United States*.<sup>87</sup> *Del-Rio* reaffirms that "[a] compensable taking arises only if the government action in question is authorized."<sup>88</sup> Even after *Del-Rio*, a takings claim will not arise from government conduct that is ultra vires.<sup>89</sup>

There is a plausible argument that government action is ultra vires if it is unconstitutional. The argument has particular force when the government action is that of the executive branch (as is true in many regulatory takings cases). The argument that unconstitutional executive action is ultra vires finds support, among other places, in the *Ex parte Young* line of cases.<sup>90</sup> Those cases, of course, generally allow a federal court to enjoin a state official from violating federal law.<sup>91</sup> To justify that relief despite state sovereign immunity, the Court has said that a state cannot authorize its officers to violate federal law. The

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(allowing the Court of Federal Claims to grant limited equitable relief).

86. See, e.g., *Crocker v. United States*, 37 Fed. Cl. 191, 195 (1997) ("To state a takings claim in this court, however, the plaintiff must concede the *lawfulness* of the actions of the Government that resulted in the alleged 'taking'.") (emphasis added); *Torres v. United States*, 15 Cl. Ct. 212, 215 (1988) ("[T]he United States Claims Court still would not have jurisdiction if the plaintiff asserts that the acts of the government leading to the alleged taking were *unlawful* or *unauthorized*") (emphasis added).

87. 146 F.3d 1358 (Fed. Cir. 1998); see also *Vereda, Ltda. v. United States*, 41 Fed. Cl. 495, 499 n.3 (1998) (describing a portion of *Torres v. United States*, 15 Cl. Ct. 212 (1988), as "no longer sound law").

88. *Del-Rio*, 146 F.3d at 1362.

89. See *id.* at 1363.

90. See *Ex parte Young*, 209 U.S. 123 (1908).

91. See, e.g., *Green v. Mansour*, 474 U.S. 64, 68 (1985). But cf. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 280-87 (1997) (holding that, in that case, a federal statute precluded relief under *Ex parte Young*).

officer who acts unconstitutionally is "stripped of his [or her] official or representative character."<sup>92</sup> This sounds like ultra vires conduct,<sup>93</sup> and similar reasoning can be found in some Supreme Court cases involving *federal* executive officials.<sup>94</sup> If unconstitutional executive action is ultra vires, then one could argue that, under *Del-Rio*, that action cannot cause a taking and hence cannot support a takings claim.<sup>95</sup> Under this line of argument, a takings claim in the Court of Federal Claims would be defeated by the prior decision of a district court that the government action underlying the takings claim was unconstitutional.

This possibility is raised only to be rejected. The key to resolving this issue is the Supreme Court's decision in *Larson v. Domestic & Foreign Commerce Corp.*<sup>96</sup> The Court said in *Larson* that sovereign immunity does not bar a suit for specific relief against a federal officer in two situations: (1) if the officer's conduct "is not within the officer's statutory powers," (2) "or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void."<sup>97</sup> It was only the first situation—executive action that exceeded the executive's statutory authority—that the *Larson* Court described as ultra vires.<sup>98</sup> *Larson* described unconstitutional executive action as void, but not as ultra vires. In cases after *Larson*, the Court has emphasized that *Larson* recognizes two distinct categories of executive action that support specific relief.<sup>99</sup>

92. *Ex parte Young*, 209 U.S. at 160.

93. See *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 144 (1984) (Stevens, J., dissenting) ("When an official acts pursuant to an unconstitutional statute [under *Ex parte Young*], the absence of valid authority leaves the official ultra vires his authority.").

94. See *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 715 (1982) (White, J., concurring in the judgment and dissenting in part) (reading *Larson* to mean that "unconstitutional actions by [government] officers could not be considered the work of the sovereign").

95. Cf. *Short v. United States*, 50 F.3d 994, 1000 (Fed. Cir. 1995) ("The government action upon which the takings claim is premised must be authorized, either expressly or by necessary implication, by some *valid* enactment of Congress.") (emphasis added).

96. 337 U.S. 682 (1949).

97. *Larson*, 337 U.S. at 702; see also *id.* at 689-91.

98. See *id.* at 689.

99. See, e.g., *Dalton v. Specter*, 511 U.S. 462, 472 (1994) (rejecting argument that unauthorized official conduct was "ipso facto in violation of the Constitution" and observing that "we have often distinguished between claims of constitutional

The distinction matters for purposes of takings claims. If an official violates statutory limits on his or her authority, the official's action cannot support a takings claim. If the official acts within the general scope of his or her statutory authority, his or her actions can support a takings claim, even if they are unconstitutional. Likewise, an Act of Congress that causes a taking of private property for public use triggers an obligation to pay just compensation, even if the Act violates some other constitutional provision.

The proper approach is illustrated in a 1998 decision by Judge Smith in *Vereda, Ltda. v. United States*.<sup>100</sup> The plaintiff there asserted that an administrative forfeiture not only caused a taking of its property but also violated the Eighth Amendment's ban on excessive fines.<sup>101</sup> The court found jurisdiction over the takings claim while finding none over the excessive-fines claim.<sup>102</sup> This would have been the proper disposition even if a district court previously had upheld the excessive-fines claim. In a situation like this, the Court of Federal Claims could hear a claim for any temporary taking that occurred before the government action was held invalid, and enjoined by a district court, under some other constitutional provision.

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violations and claims that an official has acted in excess of his statutory authority" and citing *Larson*, among other cases); *Dugan v. Rank*, 372 U.S. 609, 621 (1963) (describing *Larson* as creating two exceptions to the rule barring officer suits under the doctrine of sovereign immunity); see also *United States v. North Am. Transp. & Trading Co.*, 253 U.S. 330, 333 (1920) ("In order that the Government shall be liable [for just compensation] it must appear that the officer who has physically taken possession of the property was duly authorized to do so, either directly by Congress or by the official upon whom Congress conferred the power."); *Hooe v. United States*, 218 U.S. 322, 331 (1910) (framing the issue as whether a federal officer can "impose liability upon the Government [for just compensation], in the absence of authority from Congress"); cf. *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 330 (1922) (implying that plaintiffs would not be able to recover for a taking if they were "unable to establish authority on the part of those who did the acts to bind the Government by taking the land").

100. 41 Fed. Cl. 495 (1998).

101. See *Vereda*, 41 Fed. Cl. at 507-08.

102. See *id.*

## IV. CONCLUSION

Justice Kennedy correctly hinted in his opinion in *Eastern Enterprises* that it was unwise for the plurality to address a jurisdictional issue that had not been fully briefed and that had divided the federal courts of appeals.<sup>103</sup> The plurality's analysis of jurisdiction will perpetuate confusion and disagreement about when district courts can hear takings claims and what issues they should decide when they do. More serious is the plurality's erroneous approval of a permanent and unconditional injunction against the enforcement of a federal statute on the ground that it caused a taking. In the future, the Justices and other federal judges are urged to approach this portion of the opinion with care, recognizing that it probably did not reflect the fully considered view of a majority of the Court.

The decisions on the merits in *Eastern Enterprises* make it important to resolve the question whether government conduct can trigger a duty to pay just compensation if the conduct violates the Constitution. That question implicates the respective jurisdiction of the federal district courts and the Court of Federal Claims. To call the question one of "jurisdiction", however, understates its importance. The question really concerns whether the government can avoid its obligation to pay just compensation under the Fifth Amendment when, in taking private property, it violates some other part of the Constitution. It is hoped that the commonsense answer, as discussed above, is the one at which courts will arrive.

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103. See *Eastern Enters.*, 524 U.S. at 547 (Kennedy, J., concurring in the judgment and dissenting in part) (finding it "unnecessary to comment upon the plurality's effort to resolve a jurisdictional question despite little briefing by the parties on a point which has divided the Courts of Appeals").